



Comptroller General
of the United States

501222

Washington, D.C. 20548

Decision

Matter of: Applied Science & Technologies, Inc.

File: B-255258

Date: February 22, 1994

Robert H. Welsh for the protester,
Janice C. Beckett, Esq., Department of the Air Force, for
the agency,
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Where an invitation for bids (IFB) is converted to negotiated procedures pursuant to Federal Acquisition Regulation § 15.103, a procuring agency is not required to inform bidders of the bids received under the IFB or of the bidders that will be given an opportunity to participate in the negotiation, even where the low bid was not opened at bid opening because it was mishandled by the government.
2. An offer is not mathematically unbalanced where there is no evidence that it contains both nominal and enhanced price; accordingly, such an offer cannot be rejected as materially unbalanced.

DECISION

Applied Science & Technologies, Inc. (AST) protests the award of a contract to Midwest Environmental Services, Inc., under invitation for bids (IFB) No. F33601-93-B-0004, issued by the Department of the Air Force for cleaning and monitoring oil separators and settling basins at Wright-Patterson Air Force Base, Ohio.

We deny the protest in part and dismiss it in part.

The IFB, issued as a total small business set-aside, contemplated the award of a fixed-price, requirements contract for a 9-month base period and 4 option years. Estimated quantities were stated for the required services, and bidders were informed that the bids would be evaluated by adding the total price for all options to the total price for the basic requirement.

The following three bids were opened at the scheduled bid opening:

AST	\$1,299,826
Bidder A	\$2,366,259
Bidder B	\$3,798,500

Midwest's low bid of \$692,867, although received by the agency prior to bid opening, was mistakenly not publicly opened. The government's estimate for the contract work is \$1,353,526.

Midwest's bid was determined to be nonresponsive because Midwest had failed to acknowledge receipt of any of the eight solicitation amendments, several of which had amended the statement of work. Also, Midwest's bid contained numerous arithmetic errors such that the agency could not determine Midwest's intended bid price. The agency was also concerned that Midwest's bid may be unbalanced.

AST and Bidder A claimed mistakes in their bids in response to the agency's request that the bidders verify their bids. The Air Force determined that neither AST nor Bidder A submitted clear and convincing evidence of their intended bid prices and the bids could not be accepted. Bidder B's bid price was determined to be unreasonably high.

Because none of the bids could be accepted for award, the agency converted the IFB from sealed bid to negotiated procedures pursuant to Federal Acquisition Regulation (FAR) §§ 14.404-1(e)(1) and 15.103. The four bidders were informed of the conversion to negotiated procedures and allowed to compete. The bidders were not informed of Midwest's bid, which was not publicly opened, or that Midwest would be provided an opportunity to participate in the negotiation. Discussions were conducted, and best

AST did not timely protest that Midwest's bid was late and could not properly be considered by the agency in its evaluation of bids. The record shows that Midwest's bid was delivered to the contracting agency on the bid opening date 6 hours before the scheduled time for bid opening. Despite its timely receipt of the bid, the agency failed to follow its own internal delivery procedures and did not deliver the bid to the bid opening room to be publicly opened with the other bids.

and final offers (BAFO) received. The offerors' BAFO prices were as follows:

Midwest	\$866,506
AST	\$1,590,343
Bidder A	\$3,011,518
Bidder B	\$3,313,000

Award was made to Midwest, as the responsible offeror with the lowest price.

AST protests the agency's failure to notify it of Midwest's bid and participation in the negotiation. AST asserts that Midwest had a competitive advantage because Midwest knew the other bidders' bid prices while the other bidders were unaware of Midwest's much lower bid. AST also protests that Midwest's low price "appears to be nonresponsive to the project specifications when compared to the other bids originally received," and that Midwest's much lower price is materially unbalanced.²

Where an IFB is canceled and negotiation procedures are then used, FAR § 15.103 provides the following three requirements for completing the procurement through negotiation: (1) responsible bidders responding to the original IFB must be given prior notice of the agency's intent to negotiate and a reasonable opportunity to negotiate; (2) the negotiated award price must be the lowest negotiated price by any responsible offeror; and (3) the negotiated price must be lower than the lowest, responsive, rejected bid price of a responsible bidder. See State Mgmt. Servs., Inc., B-250538, Feb. 5, 1993, 93-1 CPD ¶ 108.

We find here that the agency's cancellation of the IFB and conversion to negotiated procedures were in accord with the regulatory requirements. Specifically, the Air Force informed the bidders, including AST and Midwest, of the agency's intent to convert the IFB to negotiated procedures and conducted discussions with the bidders that responded to the IFB. While the Air Force did not inform any of the bidders of Midwest's bid, FAR § 15.103 does not require agencies to inform bidders of all bids received by the agency or to apprise bidders of which competitors may be participating in the negotiations.

²AST also protested that Midwest is not a small business concern. We do not review size status challenges. 4 C.F.R. § 21.3(m)(2) (1993); Survive Eng'g Co., B-235958, July 20, 1989, 89-2 CPD ¶ 71. In any event, Midwest's size status was considered by the Small Business Administration, which found that Midwest is a small business concern for the purposes of this procurement.


In any event, AST was not competitively prejudiced by its being unaware of Midwest's low bid. To show prejudice here, AST must demonstrate that it would have changed its negotiated price to its competitive advantage had it known of Midwest's bid. See Dand Indus., B-244216; B-244255, Aug. 23, 1991, 91-2 CPD ¶ 193. Midwest's negotiated price is substantially lower than AST's, and AST does not assert that it would have offered a negotiated price lower than Midwest's had it known of Midwest's low bid price; in fact, AST questions whether Midwest can perform at its negotiated price. Under these circumstances there is no basis to conclude that AST would have had a reasonable possibility for award if it had known of Midwest's bid.

AST also protests that Midwest's negotiated price is materially unbalanced. Specifically, AST argues that Midwest's price for one sub-contract-line-item (sub-CLIN) is far below the government estimate and the average of the other bidders' prices for that sub-CLIN. Before a bid can be rejected as unbalanced, it must be found to be both mathematically and materially unbalanced. A bid is not mathematically unbalanced unless it is based both on nominal prices for some items and enhanced prices for other items. OMSERV Corp., B-237691, Mar. 13, 1990, 90-1 CPD ¶ 271. While AST argues that Midwest's bid contains a nominal price for one sub-CLIN, the protester does not contend that any of Midwest's CLIN or sub-CLIN prices are enhanced. Since Midwest's bid does not contain both nominal and enhanced pricing, the bid is not mathematically unbalanced and is therefore not subject to rejection as unbalanced. Id. In any event, even assuming we found Midwest's bid to be mathematically unbalanced, AST does not argue that there is any reasonable doubt that acceptance of Midwest's bid would result in the lowest overall cost to the government, such that Midwest's bid would be found to be materially unbalanced.

AST also protests the "nonresponsiveness" of Midwest's negotiated price to the project specifications, questioning whether Midwest can perform in accordance with the contract requirements at its negotiated price. This is actually a challenge to the agency's affirmative determination of Midwest's responsibility, which we will not review absent a showing that such a determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m)(5); MEDLINC Transcriptions--Recon., B-246896.2, Feb. 14, 1992, 92-1 CPD ¶ 192. Since AST does not allege fraud or bad

faith or that definitive responsibility criteria were not met, this protest allegation is dismissed.

The protest is denied in part and dismissed in part.


Robert P. Murphy
Acting General Counsel